

DEC 3 1979

MICHAEL ROBAK, JR., CLERK

In the  
Supreme Court of the United States

1978 TERM

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No. 78-1933

STEVEN H. MONTGOMERY, Individually and d/b/a  
LAMINATING COMPAY OF COLORADO, and d/b/a  
AMERICAN LAMINATING COMPANY,

*Petitioner,*

v.

CENTURY LAMINATING, LTD.,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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RESPONSE OF PETITIONER TO  
SUGGESTION OF MOOTNESS

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FRYE AND SAWAYA  
John R. Frye, Jr.  
Richard B. Rose  
*Attorneys for Petitioner*  
1650 Emerson Street  
Denver, Colorado 80218  
(303)839-1650

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To the Honorable Chief Justice and Associate  
Justices of the Supreme Court of the United States:

STEVEN H. MONTGOMERY, Individually, and d/b/a  
LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN  
LAMINATING COMPANY, the Petitioner herein, submit that  
the Suggestion of Mootness is unfounded in fact and  
law, and the appeal should be permitted to proceed to  
consideration on the merits by this Court.

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The Petitioner received the Respondent's Motion to Dismiss on November 26, 1979. On November 28, 1979, the Petitioner was informed by the Clerk of the Court that the Respondent's Motion would be treated as a Suggestion of Mootness. The Petitioner strongly urges that the issue presented is not moot and should not be dismissed on such a premise.

The Petitioner is not unaware that Rule 4 of the Federal Rules of Appellate Procedure has been amended effective August 1, 1979. The amendment does clarify the determination that courts should make in considering factual circumstances similar to those herein presented. However, the fact that the subject rule has been amended should not result in the dismissal of the present appeal on the grounds of mootness.

The ruling of the Tenth Circuit Court of Appeals in this controversy was based upon that Court's interpretation of Rule 4 prior to its recent amendment. Although the rule has been amended, the present controversy concerning the interpretation of the "old" Rule 4 must be resolved in order to justly and adequately determine the rights of the parties herein. This case must be decided on the basis of this Court's interpretation of the effect of the "old" rule. Taken in such light, the matter is not moot.

The Respondent suggests that because the rule has been clarified this Court need not consider the appeal. The Respondent fails to recognize that a dismissal for mootness would result in the loss by the Petitioner of his right to have the underlying appeal on the merits heard by the Tenth Circuit. There remains a case and controversy that is properly before this Court at this time.

Additionally, a dismissal at this time would unnecessarily impose a financial hardship upon the Petitioner. At great expense the Petitioner has prepared and filed the Brief of Petitioner and Appendix. A dismissal will render this preparation a total

waste and drain of resources.

The Petitioner finds it curious that the Respondent chose to file Motion to Dismiss three days prior to the Petitioner's filing deadline for the brief, rather than filing the Motion shortly after this Court granted the Petition for a Writ of Certiorari. Certainly, the Respondent must have been aware of the amendment in the appellate rules at the time of the granting of the Petition.

Finally, the Petitioner must believe that this Court was aware that it had amended Rule 4 of the appellate rules at the time that it granted the Petition for a Writ of Certiorari. The Court itself must have believed, as the Petitioner argues herein, that there is a present, justiciable issue to resolve, notwithstanding the amendment of Rule 4 of the Federal Rules of Appellate Procedure.

For the reasons stated above, the Petitioner suggests that the Respondent's Suggestion of Mootness is without foundation.

Respectfully submitted,

FRYE AND SAWAYA  
John R. Frye, Jr.  
Richard B. Rose  
*Attorneys for Petitioner*  
1650 Emerson Street  
Denver, Colorado 80218  
(303)839-1650